(2)

No. 90-1222

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
MILDRED WILLIAMS, et al.,
Respondents.

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
ANTOINETTE SECARD, et al.,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division 3

BRIEF IN OPPOSITION

ROMAN P. MOSQUEDA*
MIGUEL P. INUMERABLE
Law Offices of
ROMAN P. MOSQUEDA
3600 Wilshire Boulevard
Suite 2230
Los Angeles, California 90010
(213) 252-9481
Attorneys for Respondents
Antoinette Secard, et al.
**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers. (213) 627-2200

RESTATEMENT OF THE QUESTION PRESENTED

Is a printed forum selection clause in a passenger ticket for an open voyage enforceable under federal maritime law in the following factual context:

(a) Two hundred forty-four passengers filed two suits in the home port or cruise situs of the subject vessel;

(b) Some respondents had no knowledge of the forum selection clause until the transactions were complete (tickets were paid before delivery to them or their travel agents);

(c) The performance of the contract occurred in California;

(d) Some respondents would be physically and financially incapable of pursuing their action in Florida.

TABLE OF CONTENTS

	Page
RESTATEMENT OF THE QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	2
ARGUMENTS FOR DENYING THE PETITION	3
I.	
THE ISSUE, AS DETERMINED BY THE FACTS, IN *SHUTE* (NO. 89-1647) IS DISTINGUISHABLE FROM THE QUESTION PRESENTED IN THIS PETITION	3
II.	
THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS AND STATE COURTS AS TO THE ENFORCEMENT OF FORUM SELECTION CLAUSES IN PASSENGER TICKET CONTRACTS	4
A. The *Bremen* Standards, Articulated By This Court To Resolve The Differing Approaches By The Circuits, Are Controlling On The Enforceability Of Forum Selection Clauses	4
B. The Cases Decided By The First, Second, Third, Fourth and Fifth Circuits, Are Factually Distinguishable, Involved Contractual Limitations Period, And Were Decided On A Case-By-Case Basis Due To Differing Circumstances	6
C. This Is Not An Appropriate Case For Resolving The Issue Presented	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases

	Page
Carpenter v. Klosters Rederi, 604 F.2d 11 (5th Cir. 1979)	7
Catalana v. Carnival Cruise Lines, Inc., 618 F.Supp 18 (D.C. Md. 1984), aff'd, 806 F.2d 257 (4th Cir. 1986)	7
DeNicola v. Cunard Line Ltd., 642 F.2d 5 (1981)	6
Hodes v. S.N.C. Archille Lauro Ed Altri-Gestione, 858 F.2d 905 (3rd Cir. 1988)	4, 7, 8
Marek v. Marpan Two, Inc., 817 F.2d 242 (3rd Cir. 1987)	7, 8
Northwestern Nat. Ins. Co. v. Donovan, 916 F.2d 372 (7th Cir. 1990)	8
Shankles v. Costa Armatori, S.P.A., 722 F.2d 861 (1983)	6
Shute v. Carnival Cruise Lines, 897 F.2d 377 (9th Cir. 1990)	3, 8
Silvestri v. Italia Societa Per Azioni Di Navigazione 388 F.2d 11 (2nd Cir. 1968)	7
Spataro v. Kloster Cruise, Ltd., 894 F.2d 44 (2nd Cir. 1990)	7
Stewart Organization, Inc. v. Ricoh Corp. 108 S.Ct. 2239 (1988)	6
The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, (1972)	4, 5, 8

No. 90-1222

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
MILDRED WILLIAMS, et al.,
Respondents.

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
ANTOINETTE SECARD, et al.,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division 3

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This brief in opposition to the petition for a writ of certiorari is filed by the six (6) respondents in *Secard*,[1] all residents of Southern California, who sued petitioner and others[2] in the Superior Court of the State of California.[3]

The respondents in *Secard* perceive the selective assertion, as well as, omission of certain facts and procedure in the statement of the case of the petition, as prejudicially misleading, and incorporate by reference the factual and procedural statement of the decision of the California Court of Appeal. Pet. App. 2a-8a.

In addition, five (5) of the respondents[4] in *Secard* submitted individual declarations under penalty of perjury in the Superior Court, stating the facts on lack of free bargaining on the forum selection clause of the passenger ticket, all their residences in Southern California, their treatment with physicians in Southern Califor-

---

[1]They are Antoinette Secard, Edward Secard, Fred Secard, George Secard, Joan Secard and Diane Fowler.

[2]Does 1 to 100, inclusive, were sued by the *Secard* respondents as additional defendants.

[3]The *Secard* respondents filed their complaint (Case No.: SOC 96301) in the South District (Long Beach, California) of the Superior Court of the State of California for the County of Los Angeles. They boarded petitioner's liner, M/V TROPICALE, at its home port at the Port of Los Angeles in San Pedro, California. It is of Liberian registry.

[4]Respondent Diane Fowler was unable to submit her declaration on time, but her circumstances are similar to the other five *Secard* respondents.

nia, the inconvenience and expense to them to litigate their actions in Florida, and other relevant matters.[5]

ARGUMENTS FOR DENYING THE PETITION

I.

THE ISSUE, AS DETERMINED BY THE FACTS, IN *SHUTE* (NO. 89-1647) IS DISTINGUISHABLE FROM THE QUESTION PRESENTED IN THIS PETITION.

The Ninth Circuit, in *Shute v. Carnival Cruise Lines,*[6] held that: "We also find the forums selection clause requiring suit to be brought in Florida to be unenforceable in *these circumstances*". (Emphasis supplied.) *Id.* at 389.

The facts in *Shute* are distinguishable from the facts in this petition. *Shute* involves the suit of one passenger, Eulalia Shute, for injuries sustained on board the M/V TROPICALE, filed in the Washington district court. *Id.* at 379. This petition involves the suits of two hundred forty-four passengers, for injuries and other damages on board the same vessel, filed in the same California Superior Court.

In *Shute,* petitioner Carnival Cruise Lines, Inc., "never operated ships which have called at Washington ports". *Id.* This petition involves suits filed in the home port of the M/V TROPICALE, the port of Los Angeles in San Pedro, California. Mrs. Shute, just like all the respon-

---

[5]These declarations of the respondents in *Secard* were filed with the Superior Court on January 29, 1990 in support of their opposition to petitioner's motion to dismiss lawsuit pursuant to contractual forum selection clause.

[6]897 F.2d 377 (9th Cir. 1990).

dents in this petition, had to embark in Los Angeles, California, for various ports in Mexico and then return to the Port of Los Angeles. *Id.* Performance occurred in the Port of Los Angeles.

In *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione,* 858 F.2d 905 (3rd Cir. 1988), the Third Circuit considered "(t)he choice of Italian venue for disputes arising out of a cruise on an Italian vessel, departing from and returning to Italy (as) sensible and fair choice". *Id.* at 913.[7] It added that "(i)ndeed, it was the most reasonable choice of venue, if a choice was to be made". *Id.*

II.

THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS AND STATE COURTS AS TO THE ENFORCEMENT OF FORUM SELECTION CLAUSES IN PASSENGER TICKET CONTRACTS.

A. The *BREMEN* Standards, Articulated By This Court To Resolve The Differing Approaches By The Circuits, Are Controlling On The Enforceability Of Forum Selection Clauses.

In *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972), this Court resolved the different approaches taken by the Circuits[8] by enunciating standards on the enforceability of forum selection clauses.

This Court, through Mr. Chief Justice Burger, held in *The Bremen,* that:

---

[7]While the Third Circuit in *Hodes* found the forum selection clause to be enforceable, it did so on the facts of the case, as shall be discussed later in this brief in opposition.

[8]This Court cited the cases decided by Third, Second and Fifth Circuits. 407 U.S. 2, footnote 1.

> The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. *Id.* at 15.

The California Court of Appeal's decision, following the *Bremen* standards, found the forum-selection clause invalid "as the product of overreaching, i.e., a contract of adhesion, and was unenforceable in that it would be unreasonable and unjust for venue to lie in Florida." Pet. App. 9a.

There is evidence that respondents in *Secard* did not freely negotiate the choice of forum at "arm's-length," and that the passenger ticket had "boilerplate language" that respondents "had no power to alter."[9]

There is further evidence as found by the California Court of Appeal, that enforcement of the forum selection clause "would 'be so gravely difficult and inconvenient' that the plaintiffs would 'for all practical purposes be deprived of (their) day in court'." Pet. App. 10a.[10]

Indeed, the California Court of Appeals decision, while giving weight to the forum selection clause as "prima facie valid,"[11] struck it down as a contract of adhesion for being a product of overreaching, under the *Bremen* standards.

---

[9]See *The Bremen*, 407 U.S. at 12-13, footnote 14, citing the dissent of Judge Wisdom, in the Court of Appeals, using the praises: "boilerplate language" and "no power to alter."

[10]The California Court of Appeals cited *Shute, supra*, 897 F.2d at 389, quoting *The Bremen, supra*, 407 U.S. at 18.

[11]See Pet. App. 8a.

And while this Court, in *Stewart Organization, Inc. v. Ricoh Corp.,* 108 S.Ct. 2239 (1988), agreed with the Eleventh Circuit that the *Bremen* standards (forum selection clause enforceable only if reasonable and just or not invalid for no fraud or overreaching),[12] were instructive, in a federal procedural law dispute, Mr. Justice Kennedy, in his concurring opinion, "observed that enforcement of *valid* forum selection clauses, *bargained for* by the parties, protects their legitimate expectations and furthers vital interests of the justice system." (Emphasis supplied.) *Id.* at 2249.

B. The Cases Decided By The First, Second, Third, Fourth and Fifth Circuits Are Factually Distinguishable, Involved Contractual Limitations Period, And Were Decided On A Case-By-Case Basis Due To Differing Circumstances.

The First Circuit, in *DeNicola v. Cunard Line Ltd.,* 642 F.2d 5 (1981), a case of first impression[13] concerning time limitation for commencing suit, affirmed the grant of summary judgment, on the facts[14] of the case, because "the defendant had done all it reasonably could to warn of both their existence and their importance." *Id.* It then articulated the "reasonable notice" standard in *Shankles v. Costa Armatori, S.P.A.,* 722 F.2d 861 (1983), another time limitation case, with the warning that "(d)iffering circumstances may render the same ticket binding on one

---

[12] *Id.* at 2243, footnote 7.

[13] *Id.* at 7.

[14] *Id.* at 11. The First Circuit concluded that: "These facts reinforce our conclusion that the one-year limitation operates to bar the plaintiff's suit, even if her lack of knowledge of that provision is assumed."

passenger in one case, yet invalid as against another passenger in another case." *Id.* at 864.

The Second Circuit, in *Spataro v. Kloster Cruise, Ltd.*, 894 F.2d 44 (2nd Cir. 1990), also a case involving contractual limitations period, interpreted *Silvestri v. Italia Societa Per Azioni Di Navigazione,* 388 F.2d 11 (2d Cir. 1968) to require compliance with the "reasonable communicativeness" standard. *Id.* at 46.

The Third Circuit, in *Marek v. Marpan Two, Inc.,* 817 F.2d 242 (3rd Cir. 1987), in another time limitation case, a matter of first impression, adopted the "standard of reasonable communicativeness" to the facts of the case. *Id.* at 245.

The District Court, in *Catalana v. Carnival Cruise Lines, Inc.,* 618 F.Supp. 18 (D.C. Md. 1984), aff'd, 806 F.2d 257 (4th Cir. 1986), in still another contractual limitations case, granted the motion to dismiss because "(t)here is little more that the defendant could have done to call the contract conditions to the attention of the passengers and to impress upon them their importance." *Id.* at 618 F.Supp. 24.

And the Fifth Circuit, in *Carpenter v. Klosters Rederi,* 604 F.2d 11 (5th Cir. 1979), still another time limitation case, applied the "adequate notice" principle to the facts of the case. *Id.* at 13.

Only *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione, supra,* decided by the Third Circuit, involved the enforcement of a foreign forum selection clause. After finding that "the foreign forum selection clause was reasonably communicated to the Hodeses,"[15] the Third Circuit gave

---

[15]The Court applied the reasonable communicativeness test enunciated in *Marek, supra. Id.* at 910.

the reason why the question of enforcement of a foreign forum selection clause is more complex, that is, there is "no statutory provisions govern(ing) foreign forum selection clauses, "unlike clauses involving time limitation, governed by 46 U.S.C. App. of 183b." *Id.* at 912, footnote 3.

More important, the Third Circuit in *Hodes,* in fact, applied the *Bremen* standards. *Id.* at 912-913, 915-916. Although it reached a different result from that of the California Court of Appeal in this case, the Third Circuit found that the "cruise took place in Italy," the place "where performance occurred," and that "the practicalities of litigation weigh in favor of the Neapolitan forum." *Id.* at 916.

The Seventh Circuit, in *Northwestern Nat. Ins. Co. v. Donovan,* 916 F.2d 372 (7th Cir. 1990), in acknowledging "a tension between (its) approach and that of the Ninth Circuit in *Shute, supra,* stated that the "facts were special" in *Shute. Id.* at 376. It warned that enforcement of forum selection clauses may have "adverse effects on third parties." *Id.* Indeed, there are interests of persons or entities not parties to the passenger ticket contracts that would be injured by a change of venue to Florida in this case. They are defendants DOES 1 to 100 impleaded by the respondents in *Secard,* who are presumably California residents.

C. This Is Not An Appropriate Case For Resolving The Issue Presented.

The California Court of Appeals in this case, the Third Circuit in *Hodes*, and the Seventh Circuit in *Northwestern Nat. Ins. Co.,* all applied the *Bremen* standards in analyzing the enforceability of the forum selection clauses on a case-by-case basis. The tensions in approaches or differ-

ences in the appreciation of special facts by the Circuits are probably unavoidable, in view of exceptional cases, like this case of respondents in *Secard.*

Indeed, two hundred forty-four passengers filed their suits in the home port or cruise situs of the M/V TROPICALE. The six (6) respondents in *Secard* are all residents of Southern California, and were treated for soft-tissue injuries by physicians in Southern California. They had no knowledge of the forum selection clause until the transactions were complete. The performance of the cruise occurred in the Port of Los Angeles. Respondents in *Secard* would be physically and financially incapable of pursuing their soft-tissue injury action against petitioner in Florida.

Petitioner has not pointed to other suits filed in other forums as a result of this Voyage 4804 of the M/V TROPICALE in January, 1988, the subject-matter of this case. It is not defending multiple claims in multiple forums.

CONCLUSION

The petition for certiorari should not be granted.

Respectfully submitted,

ROMAN P. MOSQUEDA*
MIGUEL P. INUMERABLE
Law Offices of
ROMAN P. MOSQUEDA
3600 Wilshire Blvd., Suite 2230
Los Angeles, California 90010
(213) 252-9481
Attorneys for Respondents
ANTOINETTE SECARD, et al.
**Counsel of Record*